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| DOCKET NO: NNH-CV17-6072389-S | : | SUPERIOR COURT |
| | : | |
| ELIYAHU MIRLIS | : | J.D. OF NEW HAVEN |
| | : | |
| V. | : | |
| | : | AT NEW HAVEN |
| YESHIVA OF NEW HAVEN, INC. FKA | : | |
| THE GAN, INC. FKA THE GAN | : | |
| SCHOOL, TIKVAH HIGH SCHOOL AND | : | |
| YESHIVA OF NEW HAVEN, INC. | : | SEPTEMBER 19, 2019 |

OBJECTION TO MOTION TO PRECLUDE EXPERT TESTIMONY

The defendant, The Yeshiva of New Haven, Inc. (the “Defendant”), hereby objects to the motion to preclude expert testimony filed by plaintiff, Eliyahu Mirlis (the “Plaintiff”) filed on August 29, 2019 (the “Motion to Preclude”). Doc. No. 127. As discussed below, the Defendant’s objection should be sustained because: (1) the late disclosure of the materials upon which the Defendant’s experts relied was an oversight that was immediately rectified upon the filing of the Motion to Preclude; (2) the Plaintiff will have had more than two months since the disclosure of the defense expert witnesses, and almost two months since the production of the expert witness materials, to depose the Defendant’s experts prior to the hearing scheduled on October 21, 2019, which will thus not cause any delay in the proceeding of the hearing; and (3) there is no prejudice to the Plaintiff. Preclusion of the testimony of the Defendant’s expert witnesses would be an excessive and unnecessarily harsh result. In support thereof, the Defendant states as follows:

The hearing on the valuation of the property that is at issue in this foreclosure matter is scheduled for October 21, 2019 (the “Hearing”). The parties were to exchange the reports and any materials upon which each party’s experts relied on or before August 2, 2019. The Defendant filed its disclosure of expert witness on August 2, 2019. Doc. No. 123. The Defendant also provided the reports of its expert witnesses to the Plaintiff on or before August 2,

2019. The Defendant admits that it transmitted the materials upon which its experts relied late, on August 30, 2019, but its disclosure of those materials was only one day after the Motion to Preclude was filed. Moreover, there was no bad faith in the late transmittal of the expert witness materials, as the late disclosure of the materials was an oversight by the Defendant.

Specifically, the undersigned counsel was on vacation at the time the back-up materials were to be transmitted, and erroneously failed to forward them to Plaintiff's counsel. Upon return from vacation, the undersigned immediately commenced trial in the matter of *New England Mercantile Group, LLC v. Barnell*, Case No. HHD-CV14-6069683-S in Hartford Superior Court. Thus, the failure to transmit the material was an unfortunate error of counsel.

Connecticut Practice Book § 13-4 governs the disclosure of expert witnesses. Pursuant to § 13-4(h): "A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions." (Emphasis added).

Taking into consideration the factors outlined in P.B. § 13-4(h), courts have denied motions to preclude expert witness testimony for late disclosure even when experts were disclosed several months after the scheduling deadlines passed, and even only one week before jury selection was to begin. *Duncan v. Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 27 (2013) (no prejudice even though expert disclosed several months after expert discovery deadline in scheduling order and only one week before jury selection); *see also Hicks v. State*, 287 Conn. 421, 444-45 (2008) (Supreme Court affirming trial court's decision to permit

disclosure of expert witness six weeks after deadline and less than one month before trial because party has opportunity to depose witness prior to trial).

In *Duncan*, the Supreme Court affirmed the trial court's determination that the plaintiff's attorney's late expert witness disclosure, which he attributed to his own extenuating personal circumstances, was a good reason for the late filing of the disclosure. *Id.*, at 30 (trial court's determination that "good reasons for the late filing" existed were implicit rejection of finding of bad faith). In addition, the late disclosure did not interfere with the orderly progress of trial because the late-disclosed expert was to be deposed the day after the hearing on the motion to preclude the expert witness testimony, even though jury selection was set to begin in one week. *Id.*

Here, the sanction of precluding the testimony of the Defendant's expert witnesses would be extremely prejudicial to the Defendant and is not proportional to the noncompliance at issue. The Defendant's noncompliance was not that it failed to disclose its expert witnesses in a timely fashion, as the Defendant timely disclosed its experts and provided the experts' reports to the Plaintiff. Instead, the noncompliance was simply that the Defendant did not produce the materials underlying the experts' reports until August 30, 2019. The sanction of preclusion would be extremely prejudicial to the Defendant, as it would be unable to present its defenses as to the valuation of the property at issue, a key element of the subject matter of this action. Thus, preclusion would not be proportional to the noncompliance at issue.

The late disclosure of the expert witness materials also will not delay the scheduling of the Hearing. After discovering the oversight, the Defendant provided the materials upon which the Defendant's expert witnesses relied to create their reports to the Plaintiff, which is still almost two months prior to the scheduled Hearing. As courts have permitted the late disclosure

of expert witnesses even one week before jury selection, this is more than ample time for the Plaintiff to depose the Defendant's experts prior to the Hearing. In fact, the Plaintiff has had the opportunity to depose the defense witnesses since the disclosure of said witnesses on August 2, which is almost three months prior to the Hearing. Accordingly, there is no prejudice to the Plaintiff.

Further, there was no bad faith in the late disclosure of expert witness materials. The undersigned has been in the midst of preparing for a jury trial in the matter of *New England Mercantile Group LLC v. Barnell*. Jury selection commenced on August 26, 2019; the trial started on Tuesday, September 3, 2019, and counsel is still on trial. The undersigned had been devoting all of his time to properly prepare for trial and, although the undersigned missed the deadline set by the Court to exchange the materials upon which the Defendant's experts based their expert reports, the expert witnesses were disclosed, and the experts' reports were timely transmitted to the Plaintiff.

WHEREFORE, for the reasons set forth above, the Defendant's objection should be sustained.

THE DEFENDANT:

The Yeshiva of New Haven, Inc. fka The Gan, Inc., fka The Gan School, Tikvah High School and Yeshiva of New Haven, Inc.

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CERTIFICATE OF SERVICE

This is to certify that on September 19, 2019, a copy of the foregoing was sent to all appearing parties and counsel of record as follows via electronic email:

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